

AUG 18 2005**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS****NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS****FOR THE NINTH CIRCUIT****UNITED STATES OF AMERICA,****Plaintiff - Appellee,****v.****FRANCISCO OLEA-PINO,****Defendant - Appellant.**

No. 04-10031

D.C. No. CR-03-00182-HDM

MEMORANDUM^{*}**ON REMAND FROM THE UNITED STATES SUPREME COURT**

Before: KLEINFELD, TASHIMA and GOULD, Circuit Judges.

The Supreme Court vacated our judgment entered October 26, 2004, and remanded for further consideration in light of *United States v. Booker*, 125 S. Ct. 738 (2005).

Olea-Pino's Sixth Amendment challenge to his sentencing enhancement, based on a prior aggravated felony, remains foreclosed after *Booker*. See *United States v. Moreno-Hernandez*, No. 03-30387, 2005 WL 1560269, *8 n.8 (9th Cir.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

July 5, 2005) (explaining that a district judge's enhancing a sentence based on the fact of a prior conviction does not raise any Sixth Amendment problems).

Because Olea-Pino was sentenced under the then-mandatory Sentencing Guidelines, and we cannot reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory, we remand to the sentencing court to answer that question, and to proceed pursuant to *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc). *See United States v. Moreno-Hernandez, id.*, at *9 (extending *Ameline*'s limited remand procedure to cases involving non-constitutional *Booker* error).

REMANDED.